

IN THE  
SUPREME COURT OF THE UNITED STATES

Supreme Court, U. S.

FILED

AUG 22 1977

MICHAEL RODAK, JR., CLERK

No. 76-6617

RICHARD AUSTIN GREENE,

Petitioner,

vs.

RAYMOND D. MASSEY, Superintendent,  
Union Correctional Institution,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FIFTH CIRCUIT

BRIEF OF THE MERITS

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October Term 1977

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RICHARD AUSTIN GREENE,

Petitioner,

RAYMOND D. MASSEY, Superintendent  
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ON WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE  
FIFTH CIRCUIT

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BRIEF FOR RESPONDENT

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OPINIONS BELOW

The opinion of the Florida Supreme Court which reversed Petitioner's conviction was rendered on November 5, 1968. See Sosa and Greene v State, 215 So. 2d 736 (Fla. 1968). The opinion which denied a writ of prohibition

was rendered on April 17, 1970. See Sosa and Greene v Maxwell, 234 So. 2d 690 (Fla. 2nd DCA 1970). The opinion which considered Petitioner's second conviction after his retrial was rendered on October 25, 1974. See Greene and Sosa v State, 302 So. 2d 202 (Fla. 4th DCA 1974). The unreported opinion of a denial of habeas corpus relief was rendered on February 24, 1976. The opinion of the Fifth Circuit Court of Appeals affirming a denial of habeas relief was rendered on January 26, 1977. See Greene v Massey, 546 F. 2d 51 (5th Cir. 1977).

#### CONSTITUTIONAL PROVISIONS INVOLVED

##### AMENDMENT V

No person shall "be subject for the same offense to be twice put in jeopardy of life or limb..."

##### AMENDMENT XIV

Section 1. "... (N)or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within

its jurisdiction the equal protection of the laws."

#### STATUTES INVOLVED

##### Section 2254. State Custody; remedies in Federal courts

(a) "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

##### Florida Appellate Rule 6.16 (b)

"Upon an appeal by the defendant from the judgment the appellate court shall review the evidence to determine if it is insufficient to support the judgment where this is a ground of appeal. Upon an appeal from the judgment by a defendant who has been sentenced to death the appellate court shall review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not."

#### QUESTION PRESENTED

Whether or not federal habeas corpus review of a Fifth Amendment claim of double

jeopardy is precluded where a defendant waives his defense of double jeopardy by successfully appealing a conviction, and received an opportunity for full and fair consideration of a Fifth Amendment claim in a state court?

#### STATEMENT OF THE CASE

Sosa and Greene were tried and found guilty of murder in the first degree in November, 1965, and sentenced to death. An appeal was taken to the Florida Supreme Court in Sosa and Greene v State, 215 So. 2d 736 (Fla. 1968), and on appeal, the Florida Supreme Court in a four to three decision reversed the judgments of conviction of the defendants and remanded the case for a new trial. In its opinion the Supreme Court stated as follows:

"PER CURIAM.

After a careful review of the voluminous evidence here we are of the view that the evidence was definitely lacking in establishing beyond a reasonable

doubt that the defendants committed murder in the first degree, and that the interests of justice require a new trial. The judgments are accordingly reversed and remanded for a new trial.

It is so ordered." Id., at 737.

See also the concurring opinion, as joined in by the Justices, for the reasons for the reversal of the convictions. Sosa and Greene v State, 215 So. 2d at 742-746.

After remanding the case for a new trial, Petitioner and Sosa filed a suggestion for a writ of prohibition in the trial court claiming that trying the defendants again for murder in the first degree would be violative of the principles of double jeopardy. The trial court denied the motion, and defendants appealed the decision to the Second District Court of Appeal in Sosa and Greene v Maxwell, 234 So. 2d 690 (Fla. 2nd DCA 1970). In Sosa and Greene v Maxwell, the prohibition was denied

and the case remanded for a new trial on the charge of murder in the first degree. Defendants appealed to the United States Supreme Court and certiorari was denied. Sosa and Greene v Maxwell, 402 U.S. 951, 91 S.Ct. 1617, 29 L Ed 2d 121 (1971).

Upon retrial in 1972, Sosa and Greene were convicted of murder in the first degree, and sentenced to life imprisonment. An appeal was taken to the Fourth District Court of Appeal in Greene and Sosa v State, 302 So. 2d 202 (Fla. 4th DCA 1974), which held that the doctrine of res judicata was dispositive of the case. Writ of certiorari was again applied for and denied by the United States Supreme Court. Greene and Sosa v State, 421 U.S. 932, 95 S.Ct. 1660, 44 L Ed 2d 89 (1975).

Petitioner-Greene applied for relief in a federal habeas corpus proceeding in the United States District Court, Middle District,

Orlando, Florida Division, and relief was denied. An appeal was taken to the Fifth Circuit Court of Appeal in Greene v Massey, 546 F. 2d 51 (5th Cir. 1977), where relief was denied. Certiorari was granted by the United States Supreme Court on June 20, 1977.

#### SUMMARY OF ARGUMENT

One basic issue is raised by the instant appeal: Where a defendant successfully appeals a conviction, may a defendant plead double jeopardy in defense of a retrial after he received an opportunity for full and fair consideration in the state courts.

No question exists in the instant case in that Petitioner had an opportunity for full and fair consideration of his Fifth Amendment claim by a competent and unbiased state tribunal. Florida provides its defendants with avenues of review of federal constitutional claims, which are equivalent

to the federal statutes. Additional review by federal courts of Petitioner's double jeopardy claim is unnecessary and unwarranted.

It is fundamental in our nation's jurisprudence that a person may be retried for an offense when a conviction is set aside without running afoul of the principles of double jeopardy. A federal statute, 28 U.S.C. §2106, allows an appellate court to reverse and remand for a new trial, and some 30 state statutes, including Florida, permit retrial after a successful appeal on grounds of insufficiency of the evidence and others. The national reporters contain an infinite number of cases, where an appellate court reverses a conviction on grounds of insufficiency of the evidence and others. No double jeopardy violation exists when a defendant obtains a reversal of a conviction and is retried.

## ARGUMENT

FEDERAL HABEAS CORPUS REVIEW OF A FIFTH AMENDMENT CLAIM OF DOUBLE JEOPARDY IS PRECLUDED WHERE A DEFENDANT RECEIVED AN OPPORTUNITY FOR FULL AND FAIR CONSIDERATION OF A FIFTH AMENDMENT CLAIM IN THE STATE COURT, AND DEFENDANT WAIVED HIS DEFENSE OF DOUBLE JEOPARDY BY SUCCESSFULLY APPEALING A CONVICTION AND THE ENDS OF PUBLIC JUSTICE ARE MET BY RETRIAL.

## A

WHERE THE STATE HAS PROVIDED A PRISONER WITH AN OPPORTUNITY FOR FULL AND FAIR CONSIDERATION OF A FIFTH AMENDMENT CLAIM, FEDERAL HABEAS CORPUS REVIEW SHOULD BE PRECLUDED.

Where a defendant had an opportunity to fully and fairly litigate a federal constitutional claim in the state courts, federal habeas corpus review is precluded on the claim. See Sykes v Wainwright, \_\_\_ U.S. \_\_\_, 97 S.Ct \_\_\_, 51 L Ed 2d \_\_\_, (1977); Swain v Pressley, \_\_\_ U.S. \_\_\_, 97 S. Ct 1224, 51 L Ed 2d 411 (1977); Stone v Powell and Wolff v Rice, \_\_\_ U.S. \_\_\_, 96 S. Ct. 3037, 49 L Ed 2d 1067 (1976); Francis v Henderson, 425 U.S.

536, 96 S.Ct. 1708, 48 L Ed 2d 149 (1976);

Estelle v Williams, 425 U.S. 501, 96 S.Ct.

1691, 48 L Ed 2d 126 (1976).

Historically, the limitation of federal habeas corpus jurisdiction to a consideration of the "jurisdiction" of the sentencing court existed until Frank v Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L Ed 969 (1914), where this Court affirmed a denial of habeas relief because the petitioner's claims had been considered by a competent and unbiased state tribunal. This Court in Frank also indicated that where a state failed to provide a corrective process for full and fair consideration of federal claims, a federal court may review the merits to determine whether a conviction was lawful and proper.

In the cases of Brown v Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L Ed 469 (1953), and Fay v Noia, 372 U.S. 391, 83 S.Ct. 822, 9

L Ed 2d 837 (1963), the scope of the writ appeared to be expanded to include all types of federal constitutional claims. This Court, without discussion, continued to accept jurisdiction in all types of cases alleging unconstitutional restraint, where the issue of the scope of habeas corpus jurisdiction was not raised until this Court decided Stone v Powell and Wolff v Rice, \_\_\_ U.S. \_\_\_, 96 S.Ct. 3037, 49 L Ed 2d 1067 (1976). In Stone, this Court held:

"...we conclude that where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal and the substantial societal costs of application of the rule persist with special force." 49 L Ed 2d at 1088.

In a more recent decision by this Court, in Swain v Pressley, \_\_\_\_U.S.\_\_\_\_, 97 S.Ct. 1224, 51 L Ed 2d 411 (1977), this Court held that a District of Columbia parallel post-conviction remedy could be substituted for federal habeas, where the collateral remedy was neither inadequate nor ineffective. In holding that the Constitution does not mandate collateral review of convictions, this Court further indicated in a concurring opinion:

"Since I do not believe that the Suspension Clause requires Congress to provide a federal remedy for collateral review of a conviction entered by a court of competent jurisdiction, I see no issue of constitutional dimension raised by the statute in question." Id. \_\_\_\_U.S.\_\_\_\_, 51 L Ed at 423.

The adoption of Florida Rule of Criminal Procedure 3.850 (1973), 1.850 (1967), was a direct result of this Court's decision in Gideon v Wainwright, 372 U.S. 335, 83 S.Ct.

792, 9 L Ed 2d 799 (1963). See Roy v Wainwright, 151 So. 2d 825 (Fla. 1963). Florida's rule is similar to the federal motion to vacate, 28 U.S.C. §2255, and may be entertained when a defendant alleges unlawful prejudice or denial of constitutional rights so as to render a judgment vulnerable to collateral attack. See Gayle v State, 265 So. 2d 389 (Fla. 2nd DCA 1972), Estrella v State, 215 So. 2d 489 (Fla. 3rd DCA 1968) (allegation of coerced confession); Gil v State, 311 So. 2d 154 (Fla. 3rd DCA 1975) (denial of preliminary hearing); Nelson v State, 281 So. 2d 49 (Fla. 3rd DCA 1973) (suggestive identification); Blackburn v State, 286 So. 2d 30 (Fla. 3rd DCA 1973), Robinson v Wainwright, 240 So. 2d 65 (Fla. 2nd DCA 1970) (claim of double jeopardy); Mears v State, 232 So. 2d 749 (Fla. 3rd DCA 1970) (pretrial publicity and right to trial).

Florida's post conviction procedures provide both an available and adequate remedy for a prisoner in custody seeking relief on the basis of constitutional issues. See Fitzgerald v Wainwright, 440 F. 2d 1049 (5th Cir. 1971). See also Gaines v Rickets, 554 F. 2d 1346 (5th Cir. 1977).

Petitioner's channel of review in the Florida state courts on his double jeopardy claim included an opportunity to raise the issue in a Rule 3.850 Motion to Vacate Judgment and Sentence. Double jeopardy claims remain subject to attack in Florida by filing a pretrial motion to dismiss, suggestion for writ of prohibition, and a Motion to Vacate Judgment and Sentence. See Strawn v State ex rel. Anderberg, 332 So. 2d 601 (Fla. 1976); Florida Rule of Criminal Procedure 3.190 (b) (1973), 1.190 (b) (1967); Blackburn, Robinson. While arguing his double jeopardy claim in a

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writ of prohibition before retrial, and upon direct appeal after retrial, Petitioner had the opportunity for full and fair consideration in the state courts as his double jeopardy claim was repeatedly considered.

See Sosa and Greene v Maxwell, 234 So. 2d 690 (Fla. 2nd DCA 1970); Sosa and Greene v State, 302 So. 2d 202 (Fla. 4th DCA 1974).

Although Petitioner's claim was not considered by collateral attack in a Rule 3.850 Motion to Vacate Judgment and Sentence, Petitioner had the opportunity to raise the double jeopardy claim for additional review and still does.

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1/ It is worth noting that Francis, Williams, and Sykes, may altogether preclude federal habeas review for failure to follow a state procedural rule. Various evidentiary questions were argued on direct appeal, and no Rule 1.190 (b) (3.190 (b)), Florida Rule of Criminal Procedure, motion to dismiss was filed arguing the double jeopardy claim before retrial. See also Wainwright v O'Berry, 546 F. 2d 1204 (5th Cir. 1977).

Under 28 U.S.C. §2254 (d), Congress provided that a state court's adjudication is presumptively correct, and that the burden rests on the petitioner to establish that the state proceedings were not full and fair. See Cranford v Rodriguez, 512 F. 2d 860 (10th Cir. 1975); United States v Cannon, 508 F. 2d 197 (7th Cir. 1974); Souza v Howard, 488 F 2d 462 (1st Cir. 1973); Braxton v Wainwright, 473 F. 2d 1371 (5th Cir. 1973); Crow v Eyman, 459 F. 2d 24 (9th Cir. 1972); United States v LaVallee, 418 F. 2d 437 (2nd Cir. 1969); Maxwell v Turner, 411 F. 2d 805 (10th Cir. 1969); United States v Pate, 375 F. 2d 289 (7th Cir. 1967). Where the federal question was considered in a state proceeding not subject to challenge under the guidelines of 28 U.S.C. §2254 (d), no relitigation of the question by means of a hearing is required. See Franklin v Wyrick, 529 F. 2d 79 (8th Cir.

1976); Velleca v Superintendent, M.C.I. Wallpole, 523 F. 2d 1040 (1st Cir. 1975); United States v LaVallee, 504 F. 2d 580 (2nd Cir. 1975); Turner v Craven, 476 F. 2d 769 (9th Cir. 1973); Farmer v Caldwell, 473 F. 2d 72 (5th Cir. 1973); United States v New Jersey, 434 F. 2d 649 (3rd Cir. 1970).

Federal court reliance on state courts determinations has long been a part of the federal-state court constitutional balance of federalism. The United States Supreme Court has repeatedly held that state court determinations of state law binds the federal courts. See Scripto, Inc. v Carlon, 362 U.S. 207, 80 S.Ct. 619, 4 L Ed 2d 660 (1960); Murdock v Memphis, 20 Wall. 590, 22 L Ed 429 (1875). The federal courts have properly followed the Supreme Court's precedent, and have treated questions of state law as improper for consideration in habeas corpus

proceedings. See Buccanan v Wainwright, 474 F. 2d 1006 (5th Cir. 1973); Adams v Wainwright, 445 F. 2d 832 (5th Cir. 1971); Holloway v Wainwright, 445 F. 2d 149 (5th Cir. 1971); Anderson v Nassau, 438 F. 2d 183 (5th Cir. 1971).

The corrective process granted by Florida provided adequate channels of consideration of Petitioner's double jeopardy claim. Petitioner has not challenged, nor has he in any way intimated that state channels of consideration were inadequate or ineffective; instead, all that Petitioner argues is that 28 U.S.C. §2254 should be used to relitigate and reconsider his double jeopardy claim, and that the result which was reached by the state courts was incorrect. No claim has been made that Florida's process of adjudicating Petitioner's claim was incomplete or unfair. Instead, Petitioner

repeatedly received full and fair consideration of his Fifth Amendment claim of double jeopardy in Florida.

In Stone, this Court considered and rejected petitioner's claims that state courts were ineffective to litigate federal constitutional claims and stated:

"Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law. Martin v Hunter's Lessee, 14 US (1Wheat) 304, 341-344, 4 L Ed 97 (1816). Moreover, the argument that federal judges are more expert in applying federal constitutional law is especially unconvincing.... In sum, there is 'no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned than his neighbor in the state courthouse.'"  
Id., U.S. 49 L Ed 2d at 1087-1088, fn 35.

Petitioner's Fifth Amendment claim was repeatedly considered by the state courts. See Sosa and Greene v Maxwell, 234 So. 2d 690 (Fla. 2nd DCA 1970); Greene v State, 302 So. 2d 202 (Fla. 4th DCA 1970). Federal standards were applied to Petitioner's double jeopardy claim by the state courts. At no time has Petitioner challenged the fairness or adequacy of consideration he received in the state courts, which provided him with an adequate corrective process and forum. Further review in a federal court of Petitioner's double jeopardy claim is unnecessary and inappropriate. Nothing in the Constitution requires a prisoner to have his constitutional claims repeatedly considered by more than one tribunal where state procedures are adequate and competent, nor is there a constitutional right to an appeal. See McKane v Durstan, 153 U.S. 684, 14 S.Ct. 913,

38 L Ed 867 (1894); §924, Florida Statutes (1975). See also Abney v United States, \_\_, U.S. \_\_, 97 S.Ct. \_\_, 52 L Ed 2d 651 (1977). While the federal habeas corpus statute existed in order to review state adjudications, habeas corpus review is not of constitutional dimensions, and what the legislature has given it may take away. See Swain, 51 L Ed 2d at 419, fn 13; Ex parte Yerger, 75 U.S. (8 Wall.) 85, 19 L Ed 332, 338-339 (1869). The Supreme Court's decision in Stone was consistent with the federal courts interpretation of the federal habeas corpus statute. Further review of Petitioner's Fifth Amendment claim is unwarranted and unnecessary.

## B

WHERE A DEFENDANT SUCCESSFULLY APPEALS A CONVICTION, THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR RETRIAL.

The Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb...." Amendment V, United States Constitution. The double jeopardy provision of the United States Constitution has been interpreted as having two distinctive inquires: (1) whether jeopardy has attached in the proceeding; (2) if jeopardy has attached, is reprocsecution nonetheless permitted by reason of "manifest necessity" or to meet the "ends of public justice." See United States v Sanford, \_\_\_ U.S. \_\_\_, 97 S. Ct. 20, 50 L Ed 2d 17 (1976); Illinois v Sommerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L Ed 2d 425 (1973); United States v Perez,

22 U.S. (9 Wheat.) 579, 6 L Ed 165 (1824).

Granting a mistrial sua sponte and without defendant's consent out of regard for a defendant's interest is permissible and does not violate the provisions of the double jeopardy clause upon retrial. See Sanford, Perez; Gori v United States, 367 U.S. 364, 81 S.Ct. 1523, 6 L Ed 2d 901 (1961). Since 1824, it has been settled that the double jeopardy clause of the Fifth Amendment does not preclude a retrial for reasons deemed compelling and to meet the ends of substantial justice. See Sanford, Gori, Perez.

When a jury finds a defendant not guilty of the charge, the prosecution may not retry that defendant on the acquitted charge to gain a conviction without running afoul of the double jeopardy clause. See United States v Martin Linen, \_\_\_ U.S. \_\_\_, 97 S.Ct. 1349, 51 L Ed 2d 642 (1977); Green v United States,

355 U.S. 184, 78 S.Ct. 221, 2 L Ed 2d 199 (1957); Ball v United States, 163 U.S. 662, 16 S.Ct. 1192, 41 L Ed 300 (1896).

It is well settled in the law that a person may be retried for an offense where the prior conviction for that offense is set aside on appeal, whether the grounds be insufficiency of the evidence or the prosecution's error, see Yates v United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L Ed 1356 (1957); Forman v United States, 361 U.S. 416, 80 S.Ct. 481, 4 L Ed 2d 412 (1960); Sapir v United States, 348 U.S. 373, 75 S.Ct. 422, 99 L Ed 426 (1955); Bryan v United States, 338 U.S. 552, 70 S.Ct. 317, 94 L Ed 335 (1950); Abney v United States, \_\_\_\_ U.S. \_\_\_, 97 S.Ct. \_\_\_, 52 L Ed 2d 651, 663-664 (1977), and whether or not a defendant moves for a new trial upon conviction. See United States v Koonce, 494 F. 2d 1269 (9th Cir. 1974);

Sapir v United States, 348 U.S. 373, 75 S.Ct. 422, 99 L Ed 2d 426 (1955), where this Court, as per Mr. Justice Douglas, stated that had petitioner asked for a new trial, he opens the whole record for such disposition as might be just. Where a defendant moves for a new trial in the trial court, he has asked that his conviction be set aside, and the double jeopardy clause does not bar retrial.

The leading case construing the power of federal appellate courts to reverse a judgment of conviction pursuant to 28 U.S.C. Section 2106 is Bryan v United States, 338 U.S. 552, 70 S.Ct. 317, 94 L Ed 335 (1950). In Bryan, the defendant was convicted of two counts of attempt to evade the income tax laws. The defendant moved for a judgment of acquittal at the end of the government's case and all the evidence. Both motions were denied. After a guilty verdict

the defendant again moved for a judgment of acquittal, or in the alternative for a new trial, which were denied. The Court of Appeals reversed the judgment of conviction and remanded the case for a new trial, because it found the evidence adduced at trial insufficient to sustain the conviction. An appeal was taken to the United States Supreme Court by the defendant claiming that a judgment of acquittal should have been entered at trial.

In rejecting the defendant's argument that requiring him to again stand trial would constitute a violation of the principles of double jeopardy, this Court held that when an accused successfully appeals his conviction, the fifth amendment does not bar retrial. In addition, this Court announced that once a defendant appealed a conviction an appellate court became vested with broad discretion.

pursuant to 28 U.S.C. Section 2106 in determining what was an appropriate judgment under the circumstances.

The power of federal appellate courts was further defined in Forman v United States, 361 U.S. 416, 80 S.Ct. 481, 4 L Ed 2d 412 (1960), where an instruction was given by the trial court upon defendant's request and without objection of the government. Defendant was convicted, and upon his appeal the Court of Appeals reversed the conviction and directed the trial court to enter a judgment of acquittal. On rehearing, the Court of Appeals modified its original order for acquittal and ordered a new trial since the case might have been tried on an alternative theory. Defendant filed a motion for rehearing, contending that the Court of Appeals exceeded its power and violated the double jeopardy provision of the Fifth Amendment by directing

a new trial.

This Court held that the Court of Appeals order directing a new trial did not violate the double jeopardy provision of the Fifth Amendment, and further indicated:

"Under 28 U.S.C. Section 2106, the Court of Appeals has full power to go beyond the particular relief sought...when (petitioner) opened up the case by appealing from his conviction, he subjected himself to the power of the appellate court to direct such 'appropriate' order as it thought just under the circumstances." Id., at 425-426.

By a comparable state statute, the Florida Supreme Court has review power at least equal to that possessed by this Court under 28 U.S.C. Section 2106. Florida Appellate Rule 6.16 (b) grants Florida appellate courts the power to review the sufficiency of the evidence to determine if it is insufficient to support the judgment and if the "interests of justice" require a new trial. In Tibbs v State of Florida, 337 So. 2d 788

(Fla. 1976), the Florida Supreme Court cited as its authority to review convictions for which the death penalty has been imposed, Florida Appellate Rule 6.16 (b). The rule exists as an offshoot of Florida's zealous defense of life and liberty in death penalty cases. See Proffitt v Florida, \_\_\_ U.S. \_\_\_, 96 S.Ct. \_\_\_, 49 L Ed 2d 913, 922-926 (1976).

In Florida, as well as other jurisdictions, state statutes universally allow the prosecution to retry an accused upon a successful appeal for grounds of insufficiency of the evidence and others. See Ala. Crim. Code, tit. 15, §§ 389-391 (1959); Ariz. Rev. Stat. Ann., §13-1716 (1956); Calif. Penal Code, §1260-1262 (West 1970); Hawaii Rev. Stat., tit. 35, §641-16 (Supp. 1974); Idaho Crim. Code, ch.28, §§19-2803, 19-2821 to 2822 (1948); Mass. Ann. Laws, ch.278, §29 (1972), ch. 211, §§ (1958); Mo. Rev. Stat., §22-3605

(1974); Nebr. Rev. Stat., §29-2308 (1975);  
N.Y. Crim. Code, §470.15 (McKinney 1971);  
N.D. Rev. Code, § 29-28-28 (1974); Ill. Stat. Ann.,  
tit 110A, §615 (1976); Pa. Stat. Ann.,  
tit 19, §§1185 to 7 (1964); Ind. Stat. Ann.,  
tit. 35, §35-1-47-10 (1975); Kans. Stat. Ann.,  
§22-3605 (1974); Ohio Page's Rev. Code, §2953.07 (1973); Okla. Stat. Ann., tit. 22 §1066 (1958); W.Va. Code, §58-5-25 (1966);  
Iowa Code Ann., §793.18 (Supp. 1977); Ky. Rev. Stat. §21.055 (1971); Md. Code Ann., Md. Rules Pr., Rules 1070 to 1074, 1086 (1977); Mich. Stat. Ann., §§28.1096, 28.1098, 28.1121 (1972);  
Minn. Stat. Ann., Rules of Civil and Crim. Pr., Rule 29.02 (12) (13) (Supp. 1976); Miss. Crim. Code, §§99-35-133, 99-35-139 to 99-35-143 (1973); Mont. Rev. Stat. Ann. §§95-2404, 95-2412, 95-2426, 95-2430 (1947); Nev. Rev. Stat. Ann., §§177.225 to 177.305 (1973); N.Mex. Stat. Ann., ch. 41-15-5 (1953); N.C. Crim. Stat.

Code Ann., §§15-173.1, 15-174, 15-180 (1969); Oregon Rev. Stat., §157.065 (1975); S.D. Laws Ann., §§23-51-18 to 23-51-20 (1967); Tex. Stat. Ann. Code of Crim. Pr., Art.44.24, 44.25, 44.29 (1966); Utah Code of Cr. Pr., §§77-42-2 to 77-42-7 (1953); Va. Crim. Code, §19.2-324 (1975); 28 U.S.C. §2106 (1973). See, for example, Gray v State of Maryland, 255 A2d 5 (Md. Ct. App. 1969); United States v Musquiz, 445 F. 2d 963 (5th Cir. 1971); Yates v United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L Ed 2d 1356 (1957); Kononce.

Where the weight of the evidence is weak, though technically sufficient to sustain a motion for acquittal and a conviction, an appellate court in Florida may reverse and order a new trial to meet the ends of public justice. See Tibbs v State, 337 So. 2d 788 (Fla. 1976); Askew v State, 118 So. 2d 219 (Fla. 1960); Lowe v State, 19 So. 2d 106

(Fla. 1944); Fla. App. Rule 6.16 (b).

In an analogous situation, where a defendant requests a mistrial because of the prosecution's error, or moves to dismiss an information during trial, the double jeopardy clause does not bar retrial. See Lee v United States, \_\_\_ U.S. \_\_\_, 97 S.Ct. 2141, 52 L Ed 2d \_\_\_, (1977); United States v Dinitz, \_\_\_ U.S. \_\_\_, 96 S.Ct. 1075, 47 L Ed 2d 267 (1976). In this Court's most recent indication on whether retrial is permitted where defense counsel moves for a new trial, in Lee, after a jury was sworn, defendant's counsel moved to dismiss the information on the ground that it failed to allege specific intent. At the close of the evidence, the trial court observed that defendant's guilt had been proved beyond a reasonable doubt, and granted the motion to dismiss. Defendant was charged and convicted in a second trial. This Court held

that the order entered by the trial court was indistinguishable from a declaration of mistrial, which contemplates reprocsecution of a defendant.

In Dinitz, the defendant's main counsel was repeatedly cautioned by the trial judge about his opening argument. Persisting in his conduct, he was banished from the courtroom. The trial judge then requested his co-counsel, who was unprepared to go to trial, to proceed. The next day, co-counsel informed the court that the defendant wanted his main counsel to try the case. The trial judge set three alternatives that might be followed-- a stay of the proceeding: pending application to the court of appeals, continuation of the trial with defendant's co-counsel trying the case, or declaration of a mistrial. Co-counsel shortly moved for a mistrial.

The Supreme Court of the United States

indicated that while the defendant was faced with a "Hobson's choice" in moving for a mistrial, the defendant waived a defense of double jeopardy by moving for a mistrial:

"...a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprocution, even if the defendant's motion is necessitated by prosecutorial or judicial error... If such circumstances, the defendant generally does face a 'Hobson's choice' between giving up his first jury and continuing a trial tainted by prejudicial, judicial or prosecutorial error. The important consideration for purpose of the Double Jeopardy Clause, is that the defendant retains primary control over the course over the course to be followed in the event of such error." Id., U.S. \_\_, 47 L Ed 2d at 274-275.

When Petitioner moved for a new trial upon conviction in the trial court, the situation was similar to a request for a mistrial: Petitioner waived his double jeopardy defense by asking that his conviction be reversed. See Sapir, Bryan. See also Schulhafer.

Jeopardy and Mistrials, 125 UPa. L Rev. 449, 457 (1977).

In reviewing the Florida Supreme Court's reversal of Petitioner's case in Sosa and Greene v State, it is clear that while the state court indicated that "the evidence was definitely lacking in establishing beyond a reasonable doubt" that the defendants were guilty, the Florida Supreme Court believed that there existed an evidentiary error by testimony adduced at the first trial, and that at most, the weight of the evidence, though technically sufficient to withstand a motion for acquittal at trial and a conviction, was weak and that the ends of public justice would best be served by granting defendant a new trial:

"We come now to the critical question of whether reversible error was committed by the introduction into evidence of certain extrajudicial statements of two witnesses for the state."

\* \* \* \* \*

"Under the circumstances described above, the introduction of additional evidence in the form of extrajudicial statements incurs the danger that the jury will be inclined to consider the probative weight of such additional extrajudicial evidence solely for the purpose of establishing the substance of facts asserted therein, rather than bearing on the issue of corroboration."

\* \* \* \* \*

"For the reasons stated the judgments should be reversed and remanded for a new trial so we have agreed to the Per Curiam order doing so." Id., at 742-746.

In United States v Wiley, 517 F. 2d 1212 (D.C. Cir. 1975), the federal court reversed the conviction because the prosecution failed to present a prima facie case at trial, and relied upon its authority under 28 U.S.C. §2106, which grants an appellate court discretion to enter an appropriate judgment under the circumstances. However, the federal court

in Wiley indicated:

"There are cases in which the appellate court will use words of insufficiency of evidence when the more accurate analysis of the reversal is a determination that a retrial would be just and appropriate because the conviction was in the teeth of minimally sufficient evidence; such cases would fall within the exceptions that permit trial." Id., at 1219-1220. (Emphasis supplied).

The Supreme Court in Sosa and Greene v State, by reversing the case and ordering a retrial, felt that the ends of public justice would best be served in light of the conviction for first degree murder and the sentence of death. No prejudice emanated from Petitioner's retrial in the state court since his sentence was mitigated to life. See Dobbert v Florida, U.S. \_\_\_, 97 S.Ct. \_\_\_, 52 L Ed 2d \_\_\_, (1977); North Carolina v Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L Ed 2d 656 (1969).

From the standpoint of an appellate court, and a defendant, there are strong policy reasons

in favor of allowing an appellate court the option of reversing the case for a new trial, directing the trial court to enter a judgment of acquittal, or entering a judgment of conviction for a lesser included offense. First, by the time the conviction reaches the appellate court, the judgment has withstood numerous motions by defendant's counsel before, during, and after the trial. In addition, a jury has accepted the prosecution's case and rejected the defendant's case. By the time an appellate court considers the matter, two separate entities--a judge and jury--have decided the controversy adverse to defendant. If the prosecution could supplement its case on retrial, then the appellate court may remand the case to the trial court. This would allow the defendant another opportunity to test the prosecution's case after one judge and jury have pronounced guilt and the prosecution would have an opportunity to determine

whether or not the accused is guilty of the crime and should be punished accordingly.

A second argument in favor of granting a retrial when an appellate court reverses because insufficient evidence was adduced at trial is that appellate courts would hesitate to reverse cases in which retrial would be prohibited on the grounds of double jeopardy. Such a "fairness approach" was announced by the Supreme Court in United States v Tateo, 377 U.S. 463, 84 S.Ct. 1587, 12 L Ed 2d 448 (1964), where this Court stated:

"From the standpoint of a defendant it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution." Id., 377 U.S. at 466.

When Petitioner appealed his conviction assigning a number of alleged errors, including admitting various admissions against

Petitioner's interest into evidence at trial, which were part of the prosecution's case in chief, there was no defense of double jeopardy when the appellate court grants a new trial upon reversal.

## CONCLUSION

Petitioner's federally guaranteed constitutional rights were protected by the state courts in these proceedings. No valid double jeopardy defense exists where a defendant successfully obtained a reversal of his conviction and was subsequently retried. Both federal and state law permit the prosecution to retry a defendant upon a successful appeal.

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August 11, 1977

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## CERTIFICATE OF SERVICE

I hereby certify that I furnished three (3) copies of the foregoing brief to counsel for Petitioner, Honorable John T. Chandler, Florida Legal Services, Inc., Prison Project, 2614 S.W. 34th Street, Gainesville, Florida 32608, by mail, this the \_\_\_\_\_ day of August, 1977.

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